Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	File No. NSD-L-99-34

REPLY OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL TO COMMENTS ON ITS PETITION FOR CLARFICATION OR PARTIAL RECONSIDERATION

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SUMMARY

The primary issue on reconsideration concerns the "default" scenario that does or should apply if a switch-based reseller ("SBR") does not or cannot establish an accurate tracking and payment system, and if no other arrangements are agreed to by the parties. According to AT&T, MCI, and Sprint (the "IXCs"), SBRs that fail to satisfy the new rule's audit and certification requirement must still pay dial-around compensation directly to the PSP on some undefined basis other than by tracking calls. Under the PSPs' version of the rule, by contrast, if the SBR does not file an audit report and certification, the Intermediate Carrier ("IC") continues to be responsible to directly compensate the PSP.

The PSPs' version of the rule can provide reasonable assurance that PSPs will be "compensated for each and every . . . call" because it provides a mechanism to ensure that PSPs are compensated for SBR-handled calls even if the SBR cannot economically satisfy the certification and audit requirement. The IXCs' version of the rule, by contrast, ensures that PSPs will *not* be "compensated for each and every . . . call" because it places compensation liability on hundreds of SBRs, at least half of whom the IXCs agree cannot economically track calls.

PSPs cannot be assured of compensation for every call unless the entity responsible to pay compensation is clearly identified in advance. Under the IXCs' default-to-unqualified-SBR rule, there is no guarantee that the entities that an IC identifies as SBRs will agree that they fit the Commission's definition of SBR. Under the PSPs' default-to-IC rule, there is a high degree of certainty as to the identity of the direct payer, because only those entities that file the required certification and system audit are liable to make direct payments.

Under the default-to-unqualified-SBR rule, the mismatch between high litigation costs and the small debts owed by individual SBRs makes it infeasible to collect compensation from most SBRs that fail to pay or that inaccurately count calls. Under a default-to-IC rule, by contrast, PSPs have far greater assurance of being compensated for every call because they can collect compensation from the IC in those cases where a SBR cannot or does not establish effective track-and-pay procedures.

A default-to-SBR rule will also waste Commission resources, as well as those of PSPs and SBRs, by embroiling the Commission in numerous proceedings against SBRs who are too small to economically establish effective tracking systems.

Concerns that a default-to-IC rule would remove incentives for SBRs to develop reliable tracking systems are unfounded. If the IC-pays alternative is more expensive than the SBR-pays alternative, SBRs will have an incentive to choose the latter. Additional incentives for SBRs to track and pay will accrue because the option of doing nothing and hoping not to be sued will be unavailable.

The IXCs' circular argument that a default-to-IC rule would allow SBRs to "foist their payment obligations" on ICs ignores the fact that the circumstances under which SBRs should have direct payment "obligations" is being decided in this proceeding. Moreover, unlike the situation in earlier cases, the IC benefits economically from toll-free calls that it terminates to SBR platforms. Nothing in prior court or Commission decisions requires the Commission to make the "primary economic beneficiary" pay in every case.

Nor are SBRs being improperly exempted from payment. They will pay either directly or indirectly in any event, and ICs can collect reimbursement for their direct payments from their SBR customers. In fact, even though the Act only requires the

Commission to ensure that *PSPs* collect compensation on 100% of calls, *IXCs* have far better assurance of collecting payment from SBRs than PSPs would, because they have established business relationships with SBRs while PSPs do not. Whatever the degree of "leverage" that ICs have over SBRs, it is much greater than the amount of "leverage" that PSPs have over SBRs.

Even so, APCC urges the Commission to rule explicitly that where a SBR chooses not to undergo an audit, and an IC is liable to pay compensation instead, the IC is permitted to pay PSPs for 100% of the calls for which they receive answer supervision and to recover those payments from uncertified SBRs. Such a ruling would not conflict with the statute, and is fair to SBRs, who would have more choices than other IXCs. A SBR that does not want to be charged for uncompleted calls can simply become certified to track and pay directly like other IXCs.

The objections to IXCs being required to maintain call records for 27 months have no merit because the 18-month period for which LECs must maintain payphone line subscription records is used for the quite different purpose of ensuring timely submission of initial payment claims to *IXCs*. Call records are needed in order to evaluate IXC payments after eligibility is determined.

The objections to IXCs being required to maintain data on uncompleted calls and call duration incorrectly assume that passing the audit requirement guarantees the accuracy of payments. Audits or no audits, PSPs must have the ability to dispute payments and obtain evidence that verifies the accuracy of disputed payments.

Since there is no objection, the Commission clearly can adopt a requirement that payment reports adhere to the formats utilized by major IXC clearinghouses.

Contrary to AT&T's claim, the definition of a completed call is foursquare within the scope of this proceeding, in which the Commission has adopted specific requirements for auditors to evaluate procedures for identifying completed calls. None of the carriers disagrees with APCC's actual proposal on the merits. Nor is there any legitimate reason not to clarify the payment obligations of LECs.

Finally, the comments in favor of removing the CFO verification requirement for call reports are meritless for the reasons stated in APCC's comments.

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REPLY OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
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CLARIFICATION OR PARTIAL RECONSIDERATION

Only three interexchange carriers ("IXCs") – and no switch-based resellers ("SBRs") – oppose the American Public Communications Council's ("APCC") petition for clarification or partial reconsideration ("APCC Petition") of the Commission's Report and Order, FCC 03-235 (rel. October 3, 2003) ("*Order*"). APCC's petition.[1]

[1] *See* Comments of AT&T and Opposition to RBOC and APCC Petitions for Reconsideration, filed February 10, 2004 ("AT&T Comments"); Comments of WorldCom, Inc., dba MCI, filed February 10, 2004 ("MCI Comments"); Comments of Sprint Corporation on Petitions for Clarification or Reconsideration, filed February 10, 2004 ("Sprint Comments"). Section 1.429 of the Commission's rules requires that a reply to *an* opposition should not exceed ten pages in length. The AT&T, MCI, and Sprint comments collectively total well over the 25 pages allowed for a single opposition. Rather than filing separate ten-pages-long replies to each of the IXC's comments, APCC is filing one consolidated reply of 18 pages.

I. PSPs SHOULD NOT HAVE TO COLLECT COMPENSATION FROM SBRs WHO DO NOT QUALIFY TO TRACK AND PAY

The IXCs dispute that the Commission's new "tollgate" rules do or should require the Intermediate Carrier ("IC") to compensate the payphone service provider ("PSP") in those cases where a SBR cannot or does not comply with the audit and certification requirements. There is a significant amount of common ground, however, in the positions of PSPs and IXCs. There are three alternative payment scenarios that all the commenting parties apparently can live with:

(1) the SBR pays the PSP directly after submitting the required system audit report and certification that it can accurately track and pay compensation for payphone calls;

(2) the SBR's IC pays the PSP directly for 100% of calls terminated to the SBR's switch;[2]

(3) the SBR, IC, and PSPs agree to implement a different arrangement.

PSPs and IXCs disagree, however, on the "default" scenario that does or should apply if a SBR does not affirmatively choose any of the three alternatives described above.[3] According to the IXCs, the default should be a *fourth* alternative:

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[2] See AT&T Petition at 4-6. MCI and Sprint agree with AT&T that this 100% payment alternative should be available. MCI Comments at 6; Sprint Comments at 21-24. APCC and the RBOC Payphone Coalition support any market arrangements, including payment on 100% of calls reading the platform, that ensure PSPs are fully compensated. RBOC Payphone Coalition's Comments on Petitions for Reconsideration and Clarification, filed February 10, 2004 ("RBOC Comments") at 3-4; Comments of APCC on Petitions for Reconsideration, filed February 10, 2004, at 2-3.

[3] PSPs and IXCs also disagree on whether, if an IC is making direct payments for SBR calls (by either agreement or default), the IC should be liable to the PSP for any undercompensation. If the IC has no liability, then even if the IC miscounts the SBR's calls, or is responsible for a call tracking failure, the PSP's only remedy would be to chase the SBR—who has no control over the tracking of calls. Similarly, if the IC has difficulty collecting its payphone surcharge from the SBR, the IC would refuse to pay

(4) SBRs who are unable or unwilling to complete a satisfactory audit and certification, and who do not obtain the parties' consent to other payment arrangements, must find a way to pay compensation directly (on some undefined basis other than per-call tracking).

MCI Comments at 11. This requirement is unnecessary, inefficient, and will inevitably leave PSPs uncompensated for a significant percentage of calls, in violation of Section 276. According to the PSPs' version of the SBR-pays rule, by contrast, if a SBR fails to file an audit report and certification by the effective date of the rules, and the parties do not agree to other arrangements, the IC remains responsible to compensate the PSP directly for that SBR's calls.[4]

The PSPs believe that the new rule, which makes undergoing an audit a "precondition to tendering payment" (*Order*, Appx. C., § 64.1320(a)) already applies the appropriate default scenario. The IXCs, however, deny that "precondition" has its

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(Footnote continued)
the PSP and the PSP must, once again, chase after the SBR. This is unacceptable. If the IC is making direct payments, the IC must be liable for payment. Otherwise there is no accountability at all. *See* RBOC Comments at 3.

[4] APCC refers to the PSPs' preferred approach as a "default-to-IC" rule, and refers to the IXCs' preferred approach as a "default-to-SBR" rule. Here, default refers to the scenario that unfolds if the SBR fails to submit an audit report and certification to the FCC and the parties do not agree to an alternative arrangement. Under the PSPs' version of the SBR-pays rule, if the SBR does file an audit report and certification by the effective date of the Act, then the SBR becomes responsible to compensate the PSP directly. Even if that SBR is later found to have failed to track calls accurately, the SBR remains responsible to pay compensation directly, and may also face penalties for violation of FCC rules. But if the SBR does not file an audit report and certification, the IC remains responsible to compensate the PSP. If a SBR fails to file a renewal of its audit report and certification when due, compensation liability reverts to the IC. Thus, in every case it is possible to make a bright line determination of who is responsible to pay compensation, based on the presence or absence of the required FCC filings.

natural meaning.[5] The IXCs argue that if "precondition" means what it says, first facilities-based carriers also would be relieved from their payment obligations if they failed to complete an audit. AT&T Comments at 13. This argument disregards the fact that first facilities-based carriers are *already* subject to payment obligations under the current ("interim") rules. Thus, there can be no *pre*condition to such IXCs tendering payment – they are already paying. Clearly, it is only new payers (*i.e.*, SBRs) for whom the Commission intended to make the audit requirement a "precondition." In any event, as a practical matter, first facilities-based carriers such as AT&T, MCI, or Sprint will not fail to complete the required audit.

But in the event that the Commission did *not* intend to make the audit requirement a true "precondition" for SBRs to begin paying, the Commission must modify the rule to ensure that the audit *is* a true precondition; that is the only way that a SBR-pays rule can ensure compensation for "each and every completed . . . call."[6]

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[5] The meaning of "precondition" proffered by the IXCs make no sense. AT&T claims that "precondition" means that "an audit must be completed before the first quarterly payment is made." AT&T Comments at 13, n.7. In other words, a SBR who fails the audit is at the same time *obligated* to pay and *disqualified* from paying – an absurd result.

[6] Sprint states, without citing any authority, that "[n]othing in Section 276 guarantees 100% collection for PSPs." Sprint Comments at 13. But in fact Section 276 *does* state that the Commission shall "ensure" that PSPs are compensated for "each and every" call. This unusual language was not included on a whim – the burden is on those who claim that less than 100% compensation is acceptable to explain how and why it can be acceptable in light of the contrary statutory language. *See also Order*, ¶ 44 and Appx. C, § 64.1310(a)(3) (Completing Carrier must certify that the payment "is based on 100% of all completed calls that originated from that payphone service provider's payphones"). A footnote elsewhere in the *Order*, however, states that "a 100% compliance rate on each of the criteria set forth [in ¶ 40] is not required to satisfy the audit." *Id.*, ¶ 39, n.109. If this footnote is meant to suggest that payment for less

A. Only A Default-To-Intermediate-Carrier Plan Can Ensure That PSPs Are Fairly Compensated For Each And Every Completed Call

The PSPs' version of the rule can provide reasonable assurance that PSPs can be compensated for every completed call, because it provides a mechanism to ensure that PSPs are compensated for SBR-handled calls even if a reseller denies it is a SBR or simply cannot economically establish a tracking and payment system. The IXCs' version of the rule, by contrast, ensures that PSPs will *not* be compensated for every call, because it places compensation liability on hundreds of SBRs, almost half of whom even the IXCs agree cannot economically track calls.[7]

1. Only a default-to-IC rule ensures that the responsible payer can be identified in advance

PSPs cannot be assured of compensation for every call unless the entity responsible to pay compensation is clearly identified in advance. Although the *Order*

(Footnote continued)
than 100% of completed calls is permitted, it is in conflict with both the statute and the Commission's new rules.

Sprint also implies that the need for "fairness to both sides" could preclude PSPs from being compensated for "each and every completed . . . call." Sprint Comments at 13. That reading might be reasonable if Section 276 stated that PSPs should be "compensated for each and every completed . . . call *if it is fair to do so.*" But that is not what the statute says. The statute requires PSPs to be compensated "fairly" *for every completed call,* without any ambiguity or qualification (other than the express exemption of emergency and telecommunications relay service ("TRS") calls). The inclusion of the word "fairly," which modifies *only* the word "compensated," does not alter the plain meaning of "each and every . . . call" or reduce the percentage of completed calls for which PSPs must be compensated below 100% of non-emergency, non-TRS calls.

[7] *See* MCI Comments at 9-10 (40-50 percent of SBRs find it too expensive to establish a tracking system). APCC believes the percentage is substantially larger.

states that the new rule "specifically addresses the PSPs' need to identify the liable entity" (*Order*, ¶ 26), the IXCs' version of the rule does not do so. Under that version, there would be no guarantee that the entities identified as SBRs in an IC's reports to PSPs would agree that they fit the Commission's definition of SBR.[8]

On the other hand, as APCC's petition explains, under a default-to-IC rule, there is a high degree of certainty as to the identity of the direct payer. All parties know which entities are required to make direct compensation payments because only those entities that file the required certification and system audit – copies of which will be distributed to ICs and PSPs – are liable to make direct payments.

2. Only a default-to-IC rule ensures that compensation can be economically collected

To ensure compensation for "each and every completed . . . call," the FCC must also ensure that PSPs have a realistic opportunity to collect the compensation due. As APCC's petition demonstrates, collecting dial-around compensation from SBRs who cannot or will not establish a reliable tracking system is simply impractical in most cases. Unlike ICs who have the ability to cut off service from customers who do not pay their bills, PSPs must rely on litigation – the most expensive collection method – as their primary means of collecting compensation from recalcitrant SBRs. Most SBRs are

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[8] As noted in the petition, the Commission defines "SBR" as "a facilities-based long distance carrier that switches long distance traffic using a switch that it owns or leases." APCC has previously encountered entities, identified by an IC as SBRs, who took the position that they are not SBRs, for example because they merely lease switch capacity and not whole switches, or because they merely provide switching equipment for use by others.

simply too small to justify the high cost of instituting collection proceedings.[9] Under a SBR-pays-by-default rule, PSPs once again would be faced with the prospect of fruitlessly pursuing numerous non-paying or underpaying SBRs.

Under a default-to-IC rule, by contrast, PSPs have far greater assurance of being compensated for every call because they can collect compensation from the IC in those cases where a SBR does not establish the requisite tracking procedures.

B. Only A Default-To-IC Rule Will Conserve The Resources Of The Commission And The Affected Parties

A default-to-SBR rule will waste Commission resources by embroiling the Commission in numerous complaint proceedings and forfeiture proceedings against SBRs who are too small to economically establish effective tracking systems and who either fail to file a certification or fail to live up to their certifications. These disputes will also waste the resources of PSPs and SBRs. Further, resources will be wasted even when SBRs comply, if they cannot do so economically. Just as switchless resellers are not required to make direct payments even though they are "primary economic beneficiaries," because it is not practical for them to invest resources in tracking calls, those SBRs who cannot economically establish a reliable tracking system should not be required to waste resources by constructing such a system.

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[9] As noted above, the IXCs concede that almost half of SBRs find it too costly to implement call tracking/payment systems. It logically follows that a SBR for which establishing a tracking system is uneconomical is also likely to be a SBR whose individual compensation debt is not large enough to justify the cost of litigation. Notwithstanding, Sprint's unsupported contrary claim, the sworn declaration of APCC's experienced collection attorney confirms that litigating complaints against SBRs is very costly. *See* Reply Comments of APCC, filed July 3, 2003, at 19-27 and Exh. 1. *See also* APCC Petition at 9-11.

C. A Default-To-IC Rule Will Encourage SBR Compliance With The Audit And Certification Requirements

MCI is afraid that making SBR liability contingent on passing an attestation "would remove incentives for SBRs to develop reliable tracking systems." MCI Comments at 16. MCI's concern is unfounded. The strength of SBRs' incentives to develop reliable tracking systems, of course, depends on the available alternatives, which are largely within the control of ICs. For example, if the payment obligation defaults to the IC, the IC can determine how much to mark up the compensation payments that it passes through to SBRs. If the IC-pays alternative is more expensive than the SBR-pays alternative, SBRs will have an incentive to choose the latter.

Further, the IXCs themselves have presented a compelling argument that, when SBRs consent to ICs being the payers, ICs should be able to track, pay and recover for 100% of calls for which they receive answer supervision indicating termination of the call at the SBR switch. This alternative provides an added incentive for SBRs to develop reliable tracking systems where it is practical for them to do so.

In fact, under a default-to-IC rule, there will be a *greater* incentive for SBRs to develop reliable call tracking systems, because one of the alternatives that has often proved least costly for SBRs in the past – the "do-nothing-and-hope-it-is-not-cost-justifiable-to-sue-me" alternative – would be unavailable under a default-to-IC rule.

D. A Default-To-IC Rule Is Fair To ICs

To the extent that the Commission has a statutory mandate to ensure that the dial-around scheme is "fair to all parties,"[10] a default-to-IC rule satisfies that requirement.

1. A default-to-IC rule is consistent with case law

The IXCs make the circular argument that "APCC's proposal would allow SBRs to foist their payment *obligations* on IXCs by ignoring their mandatory audit *obligations*." AT&T Comments at 13 (emphasis added); *see also* Sprint Comments at 12. To the extent that prior cases stand for the proposition that one carrier cannot be held responsible for another carrier's pre-existing "obligations" (Sprint Comments at 12), that principle does

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[10] *Order*, ¶ 25. The Commission's interpretation of "fairly compensated" has not been tested, however. APCC believes it is clear from the language and context of Section 276 that "fairly compensated" means specifically that compensation must be fair *to the PSPs who are to be compensated*, not that it must be fair to parties from whom the compensation is obtained – who are not even identified in the statute. In this regard, the meaning of "fairly compensated" as focusing on the person being compensated is comparable to the meaning of "just compensation" in the Takings Clause of the Fifth Amendment, where "just" refers only to justice for the person being compensated. In that context, "just compensation" has been held to mean "a full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). It is the loss to the party to be compensated, not the gain to the party from whom compensation is due, *i.e.*, the government, that is the measure of "just compensation." *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 281 (1943); *United States v. Miller*, 317 U.S. 369, 375 (1943); *Roberts v. New York City*, 295 U.S. 264 (1935). There is no consideration of the value of the property to the government. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956).

not apply here.[11] Here, there *are* no pre-existing obligations. As the *Order* explains, "the statute does not specify . . . the party responsible for payphone compensation." *Order*, ¶ 25. Thus, a default-to-IC rule does not "exempt" any SBR from paying for "services received." *IPTA* at 566. Rather, the *Order* expressly permits ICs to recover their compensation payments from SBRs.[12] *See Order*, Appx. B, § 64.1310(b). The circumstances under which SBRs *should* have direct payment and mandatory audit "obligations" is precisely the issue that is to be resolved in this proceeding.

Moreover, nothing improper is being "foisted" on IXCs – SBRs will pay either directly or indirectly in any event, and ICs will be able to collect reimbursement for their direct payments from their SBR customer. Further, unlike in *IPTA*, where there was no nexus between the paying carriers and the share of calls for which they were held liable, an IC (whether or not a call is completed from the platform to an end user)

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[11] In fact, that is *not* the holding of *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) ("*IPTA*"). Rather, *IPTA* held that "[a]dministrative convenience cannot possibly justify an interim plan that exempts all but large IXCs from playing for the costs of services received." *IPTA* at 566.

[12] Even the concept of "services received" by a particular carrier is not applicable here prior to a determination of who should pay the PSP for the "services". As the *Order* itself recognizes, the PSPs do not know in advance, and often do not even know after the fact, until they receive payment, what carriers are handling calls from their payphones. While the *Order* states that "the PSPs provide services to the SBRs so that the SBRs can render services to [end users]" (*Order*, ¶ 29), there is nothing that dictates this conclusion. It can equally well be stated that "the PSPs provide services to the *ICs* so that the *ICs* can render services to their customers the SBRs, who in turn can then render services to end users." This is, for example, the model that is reflected in the Commission's access charge rules: An originating LEC provides service to an IXC, who in turn may provide service to a SBR. The fact that the SBR retails service to the end user does not dictate that the SBR must be the one who makes the direct payment to the LEC.

derives revenue from the "toll-free" call that it terminates at its SBR customer's platform in the same way as from any other payphone-originated toll-free calls. AT&T contends that economic benefits are not enough – an IXC must be the "primary" economic beneficiary for a payment requirement to pass muster under *IPTA*. AT&T Comments at 11. But it is the Commission, not the D.C. Circuit, that has decided to apply the "primary economic beneficiary" principle. A Commission-made principle can and does have Commission-made exceptions.[13] AT&T's argument would force the FCC to abandon such longstanding payment arrangements as access charges, meet point billing, and reciprocal compensation.

2. IXCs are not unduly burdened by a default-to-IC rule

While the IXCs complain that ICs recovery of their payments from SBRs is not 100% assured, ICs have far better assurance of collecting payment from SBRs than PSPs do, for the simple reason that ICs have an established business relationship with SBRs while PSPs do not. Although the *Order* questions the amount of "leverage" that this relationship affords ICs, the fact remains that, whatever the degree of "leverage" that

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[13] As the RBOC Coalition points out (RBOC Petition at 12), and as WorldCom recognizes (WorldCom Comments at 2), the Commission did not require switchless resellers to pay compensation directly "even though they were the primary, direct, economic beneficiaries of dial around service." *Id.* AT&T responds that "exempting" switchless resellers was justified because they lack the ability to track calls to completion. AT&T Comments at 10, n.4. AT&T thereby confirms that the supposedly ironclad rule that it attributes to the D.C. Circuit, precluding any "shifting [of] payment responsibilities" away from the "primary economic beneficiary," is not ironclad at all. AT&T and WorldCom are reduced to arguing that the D.C. Circuit allows such "shifting" based on considerations of "trackability" but not based on considerations of "administrability". MCI Comments at 12-13; AT&T Comments at 10. In fact, the D.C. Circuit has never addressed the "primary economic beneficiary" issue at all.

ICs have over SBRs, it is much greater than the amount of "leverage" that PSPs have over SBRs.[14] In any event, Section 276 requires only that *PSPs* be compensated for every call. It does not require that *IXCs* be able to recover 100% of their compensation payments from particular customers.

Even so, APCC urges the Commission to rule explicitly that where a SBR chooses not to undergo an audit, and an IC is liable to pay compensation instead, the IC is permitted to pay PSPs for 100% of the calls for which they receive answer supervision and to recover those payments from uncertified SBRs. To that extent only, the Commission should grant AT&T's petition. A default-to-IC rule that allows ICs to pay on 100% of terminated calls would not conflict in any way with the statutory requirement that PSPs be compensated for "each and every completed . . . call." The statute does not in any manner prohibit PSPs from receiving compensation for calls that are not completed.[15]

This rule is also entirely fair to SBRs. The SBR would have a choice that is not even available to ICs – the option of not participating in the direct-payments system. Thus, whether PSPs would receive compensation only for completed calls, or for some uncompleted calls as well, would be a matter of choice for each SBR. If a SBR does not

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[14] To the extent that the *Order* rules otherwise, it is clearly incorrect and must be reconsidered. And in addition to contractual leverage, of which ICs have some and PSPs do not, whatever leverage the compensation rules provide to PSPs is also available to ICs.

[15] Indeed, the "caller-pays" approach that Sprint never tires of advocating would result in compensation for every call for which the *payphone* receives answer supervision, including all calls terminated to a SBR switch. Although there are many reasons to reject caller pays, no one, least of all Sprint, has ever suggested that illegal "overcompensation" of PSPs is one of them.

want to be charged by its IC for surcharges or uncompleted calls, the SBR has two other alternatives. The SBR can establish a system for tracking only completed calls, like other IXCs, or it can negotiate an alternative arrangement with its IC and the PSPs.[16] But if these alternatives are less economical for the SBR than being charged by an IC for all calls terminated at the SBRs platform, there is no valid reason why that alternative should not be available to SBRs as a default option.

II. ADDITIONAL ISSUES

A. Verification Data Must Be Kept For At Least 27 Months

AT&T does not object to APCC's request that IXCs be required to maintain verification data for 27 months. The other two IXCs object, but on the spurious ground that "Intermediate and Compensating Carriers should not be required to retain their verification data longer than LECs." MCI Comments at 19; *see also* Sprint Comments at 15. The objection has no merit because the LEC records are used only by IXCs to make a threshold determination whether payphones are eligible for compensation. The 18-month LEC deadline thus reflects a Commission determination that PSPs should submit

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[16] While AT&T claims that obtaining PSPs' consent to alternative arrangements is burdensome, the experience of the compensation true-up actually shows that PSP "aggregators" such as APCC Services, Inc., provide an effective means of obtaining PSPs' consent to releases, settlement agreements and the like. APCC Services and the three RBOCs alone account for well over 75% of the payphone industry. Thus, it should not be too difficult for SBRs or ICs to obtain the consent of the PSPs operating the overwhelming majority of payphones for any alternative arrangement that benefits PSPs. Those PSPs that cannot be reached or do not consent can simply be handled under the default option with minimal loss.

claims for compensation *to IXCs* no later than 18 months after the end of the compensation period.

Call records, by contrast, are needed to establish the amount that an eligible payphone should be paid "in the event of disputes" with Completing Carriers. *Order*, ¶ 45. Disputes over the number of calls subject to compensation cannot arise until *after* a PSP has submitted an initial claim for payment, because the carrier does not report call volume to the PSP until it proffers payment. Therefore, the time limit for LECs to maintain verification records and for PSPs to submit initial claims has no relevance to the period for which IXCs must maintain call records.

As stated in APCC's petition, moreover, systematic errors or abuses resulting in underpayments may not become evident until they have persisted for several payment cycles. Verification data must be available, consistent with the statute of limitations, long enough to enable such systematic errors to be detected and redressed.

B. Carriers Must Be Required To Record And Report Uncompleted Calls And To Record Call Duration

AT&T, MCI and Sprint also oppose being required to report call volumes and record call data for uncompleted calls, or to report call duration data – even for completed calls – but only Sprint claims (without any support) that it is "technically infeasible" to do so. Sprint Comments at 16. Sprint's unsupported claim of technical infeasibility must be rejected.

Although the carriers argue that information about uncompleted calls is "irrelevant" (AT&T Comments at 14), they fail to rebut APCC's explanation that it is precisely those calls that are regarded by the carrier as uncompleted that are most likely to become the subject of a dispute. AT&T assumes that a carrier always "knows" when

calls are completed and will never make an error, but SBRs have frequently stated to APCC Services an incorrect definition of "completed call" (see below). In the event of incorrect, negligent, or abusive tracking practices, there is no way for PSPs to definitely establish the true number of completed calls unless carriers are required to record all calls terminating at their platforms. And as AT&T acknowledges, IXCs "have no incentive" to maintain uncompleted call data unless they are required to do so. AT&T Comments at 14.

A requirement to identify uncompleted calls can also enable PSPs to find out whether discrepancies between a PSP's call detail reports and an IXC's completed call records are occurring because the IXC records the calls as uncompleted or because it does not record the calls at all. Calls often fail to be recorded by IXCs because they have not ordered or not adequately tested the FLEX ANI service that enables IXCs to identify calls originating from payphones.

The IXCs also object to maintaining call duration data, claiming that call duration too is "irrelevant" because a caller "may need a minute or more" just to finish dialing the call. Duration data need not, however, be used to "prove" conclusively that one particular call was complete. Rather, duration data can indicate an overall pattern of non-payment for lengthy calls. Such a pattern would be sufficient, at a minimum, to trigger further investigation of whether a carrier is accurately identifying completed and uncompleted calls.

The IXCs claim that the audit requirement is sufficient to ensure "that completed calls do not go uncompensated and unreported." MCI Comments at 17; *see also* Sprint Comments at 16. These IXCs are doubtless preparing to argue that passing an audit should give them immunity from undercompensation claims. There is no reason to

believe, however, that a telecommunications audit, any more than an ordinary financial audit, can guarantee there will be no irregularities, oversights or abuses.

C. There Must Be A Uniform Reporting Format

AT&T and MCI do not object to adhering to a uniform reporting format, as long as it is consistent with the formats used by the main IXC compensation clearinghouses. AT&T Comments at 14-15; MCI Comments at 18. Even Sprint concedes that data reporting formats should be "consistent with industry norms." Sprint Comments at 17. Since there is no opposition to a requirement of consistency with clearinghouse formats, this reasonable requirement should be adopted.

D. The Commission Should Clarify When Calls Are "Completed" To Carriers

MCI does not oppose APCC's request to clarify the definition of a completed call. AT&T does oppose it, but only on the spurious legal grounds that the definition is "beyond the scope of this proceeding" and that APCC did not identify the findings or conclusions of the *Order* that should be reconsidered. AT&T Comments at 15. APCC agrees that the Commission did not reach any specific conclusions in the *Order* regarding the definition of completed call – that is why APCC is requesting *clarification*, not *reconsideration*. APCC Petition at 23. Since APCC is not requesting reconsideration on this point, the rule cited by AT&T does not apply.

Further, the definition of completed call cannot possibly be beyond the scope of this proceeding. The essential change made by the *Order* is to shift payment responsibility to the "*Completing* Carrier," defined as "a long distance carrier . . . that *completes* a . . . call." 47 CFR § 64.1300(a) (emphasis added). Even more important, the *Order* adopts a rule requiring specific business rules and procedures, confirmed by an

audit, to "accurately track calls to *completion*" and to identify "compensable payphone calls and "in*complete* or otherwise noncompensable calls." 47 CFR §§ 64.1320(c)(1), (9). There is every reason for the Commission to clarify this term – especially when dozens of previously nonparticipating and/or non-complying carriers must establish, for the first time, demonstrably accurate means of identifying completed payphone calls.

Sprint calls APCC's request "outlandish" but endorses the very clarification APCC is requesting – that carriers should "compensate PSPs when a carrier's own 8XX number is serving the same purpose as any other business number." Sprint at 18. Contrary to Sprint's misreading, APCC is not requesting that the Commission "turn noncompleted platform calls into compensable calls." *Id.* APCC specifically stated that a call answered at a carrier's platform should be considered "completed" if "the caller does not attempt to use the carrier's platform to place a further call." APCC Petition at 23.

E. The Commission Should Clarify LEC Payment Obligations

Only Sprint reflexively opposes clarification of LEC payment obligations as "unnecessary." Sprint Comments at 19. Sprint can only speak for itself – it cannot know if "[o}ther LECs" are meeting their obligations. Given the major problems that have resulted from past ambiguities in the compensation rules, the Commission should err on the side of clarity.

F. IXCs Who Cannot Comply With The CFO Verification Requirement Should Request A Waiver

MCI and Qwest support Sprint's request that a carrier's chief financial officer ("CFO") should not have to verify the accuracy of payments. MCI Comments at 18; Comments of Qwest Communications International, filed February 10, 2004. Again,

most of the IXCs that will owe payphone compensation are small businesses nowhere near as large as MCI, Qwest, or Sprint. Whatever the burdens on these carriers' CFOs, they are clearly differently situated than SBRs, none of whom has requested reconsideration of this or any other aspect of the new rules. Given the history of SBR non-compliance, it is important to ensure that the CFOs of SBRs are focused on their compensation obligations – just as the presidents of PSPs must focus on verification of PSPs' eligibility. APCC Comments at 9. If MCI, Qwest, and Sprint believe their CFOs should not have to deal with compensation requirements, they can avail themselves of the waiver procedures of the Commission's rules.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2004, copies of the foregoing Reply of the American Public Communications Council to Comments on its Petitions for Clarification or Partial Reconsideration were served on the parties (except those marked with an asterisk) via first-class mail. Copies were served on the parties marked with an asterisk (*) via electronic mail on February 20, 2004.

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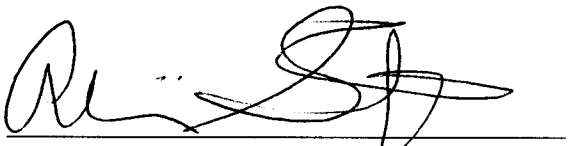

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